

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1833-CR

Cir. Ct. No. 2012CF222

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. DEAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Michael Dean appeals an order denying his motion to withdraw a guilty plea due to ineffective assistance of counsel. Dean argues his counsel was ineffective for failing to advise him of a potential plea of not guilty by

reason of mental disease or defect (NGI), based on Dean's purported memory loss. We reject Dean's argument and affirm.

BACKGROUND

¶2 Dean was convicted of a sexual assault in 2004, requiring him to register with Wisconsin's sex offender registry. While in prison, Dean suffered a serious head injury when he was attacked and hit his head on concrete.

¶3 Dean created a Facebook account under the name "Michael Hunkins" and did not notify his agent or the registry of the account.¹ In April 2012, law enforcement notified Dean it did not have a record of the Facebook account or Dean's use of the surname Hunkins. Dean then promptly notified the registry of the account and changed his last name to Dean on Facebook.

¶4 Dean was subsequently charged with failure to register with the sex offender registry and failure of a sex offender to identify oneself correctly, both of which are class H felonies. Pursuant to a plea agreement, Dean pled guilty to only the failure-to-register charge, and a presentence investigation (PSI) was ordered. The agreement provided for a joint recommendation of a withheld sentence, three years' probation, and no more than six months' jail as a condition of probation.

¶5 Prior to the sentencing hearing, Dean reviewed the PSI report with his trial counsel. They discussed Dean's head injury and associated memory loss. At the initial sentencing hearing, Dean's counsel pointed out this memory loss

¹ Dean later testified that Hunkins was his stepfather's surname and that Dean had no relationship with his biological father.

when discussing mistakes or omissions in the presentence investigation.² Dean was ultimately sentenced to three years' initial confinement and three years' extended supervision.

¶6 Dean moved to withdraw his plea claiming he received ineffective assistance of counsel. His motion alleged:

When the defendant accessed [F]acebook, his memory loss led him to believe he had informed his agent of the account.

When filling out sex offender registry forms, the defendant either could not recall his [F]acebook account due to his memory loss, or had believed he previously informed his agent of the account due to his memory loss.

(Numbering omitted.) Dean further alleged that had trial counsel informed Dean he could attempt to withdraw his guilty plea prior to sentencing and instead enter an NGI plea, he would have done so.

¶7 The circuit court held a hearing on Dean's motion, and both Dean and his trial counsel testified. Counsel testified that he understood Dean's memory loss was only of the actual event causing injury, as opposed to ongoing general memory problems. Further, counsel testified there was never any discussion during his representation wherein Dean claimed to have any memory loss concerning his failure to register.

¶8 The court made credibility determinations concerning the testimony of Dean and his trial counsel. The court explained:

In my opinion, based upon the evidence presented, my review of the file, I don't think manifest injustice has been

² The judge at the initial sentencing hearing recused himself. Therefore, a second sentencing hearing was held.

proven. I think it's just[, “[I don't like the outcome.[”] ... [I]n my opinion, Mr. Dean doesn't like the outcome and I understand that. ... [I]n my opinion, Mr. Dean thought he was going to have the plea agreement and then when I didn't follow it, that's when there became the problem. I mean, when you read the sentencing transcript, nowhere did Mr. Dean say[, “[I didn't know, I thought I had reported it, I didn't know.[”] He had that opportunity. He had the opportunity to in the PSI. He had the opportunity to mention it to his attorney. He didn't.

Quite frankly, I don't find Mr. Dean in the least bit credible. He vacillates between showing sophistication in his explanation of some of the Court's questions—that was the reason why I was asking some questions—and then going back to say[, “[W]ell, I thought that I had reported. I forgot.[”] I just—his testimony doesn't—you know, it's self-serving. It just doesn't meet the smell factor for being credible.

¶9 The court also addressed trial counsel's credibility:

[Trial counsel], on the other hand, very experienced attorney. He came across as credible. He didn't try to overstate anything. If he remembered, he remembered; if he didn't, he said he didn't. He quite frankly said NGI never came up because it wasn't even on the radar, so to speak, because there was never a discussion[, “[W]ell, I don't remember[,”] or “[I thought that I had registered that Facebook account, but because of my memory, you know, obviously I didn't[,”] or something like that. That never came up.

¶10 In light of its findings of fact and credibility, the circuit court determined trial counsel had not performed deficiently and, therefore, there was no manifest injustice warranting plea withdrawal. Dean appeals.

DISCUSSION

¶11 Dean argues the circuit court erroneously determined there was no manifest injustice warranting plea withdrawal. A defendant seeking to withdraw a guilty plea after sentencing carries the burden of establishing a manifest injustice.

State v. McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Proof of ineffective assistance of counsel satisfies the “manifest injustice” standard. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶12 An ineffective assistance of counsel claim requires proof that counsel performed deficiently and that the deficiency resulted in prejudice. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). We will not reverse the circuit court’s findings of fact unless they are clearly erroneous. *Id.* at 634. This same deferential standard applies to the court’s credibility determinations. *See State v. Domke*, 2011 WI 95, ¶58, 337 Wis. 2d 268, 805 N.W.2d 364. However, the questions of whether counsel’s performance was deficient and whether it was prejudicial to the defendant are questions of law subject to de novo review. *Pitsch*, 124 Wis. 2d at 634.

¶13 Dean emphasizes he “testified that this memory loss interfered with his ability to comply with the requirements of the Registry[,]” and argues his trial counsel was ineffective for failing to discuss whether his “memory loss would interfere with his ability to form the intent necessary to be found guilty of the offense.”³

¶14 Dean’s argument, however, ignores the circuit court’s findings of fact and credibility determinations set forth above. Dean has not shown—or even argued—that the court’s findings were clearly erroneous. Dean’s contention that trial counsel had a duty to identify a potential NGI defense under the facts here is farcical. His counsel cannot reasonably be faulted for failing to identify or discuss

³ We observe Dean never explains in the first instance how intent is relevant to either of the charged crimes—as opposed to Dean’s ability to conform his behavior to the law.

a potential NGI defense where there was no underlying factual basis to suspect such a defense was plausible. Dean never told counsel he forgot to register with the sex offender registry or that he had any general memory loss—as opposed to specific memory loss regarding the head-injury incident itself. Thus, the court properly determined that counsel did not perform deficiently and that, therefore, there was no manifest injustice warranting plea withdrawal.

¶15 In light of the circuit court’s factual and credibility findings, Dean’s argument has no merit.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

